

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

TERESA FELIX,)	No. CV-F-04-6198 OWW
)	(No. CR-F-03-5165 OWW)
)	
Petitioner,)	ORDER DENYING PETITIONER
)	TERESA FELIX'S MOTION TO
vs.)	VACATE, SET ASIDE OR CORRECT
)	SENTENCE PURSUANT TO 28
)	U.S.C. § 2255 AND DIRECTING
UNITED STATES OF AMERICA,)	CLERK OF COURT TO ENTER
)	JUDGMENT FOR RESPONDENT
)	
Respondent.)	
)	
)	

On September 3, 2004, petitioner Teresa Felix timely filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

Petitioner pleaded guilty on November 17, 2003 pursuant to a written Plea Agreement to Count Three of the Superseding Indictment charging her with distribution of 5 grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. The Plea Agreement provides in pertinent part:

2. Agreements by the Defendant.

...

(d) The defendant is aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Acknowledging this, the defendant knowingly waives the right to appeal her conviction and similarly waives the right to appeal any sentence (or the manner in which the sentence was determined) on the grounds set forth in Title 18, United States Code, Section 3742 or on any ground whatever, in exchange for the concessions made by the United States in this plea agreement. The defendant also waives her right to challenge his [sic] conviction, sentence or the manner in which it was determined in any post-conviction attack, including but not limited to a motion brought under Title 28, United States Code, Sections 2241 or 2255.

...

4. Nature, Elements, Possible Defenses, and Factual Basis.

...

(c) The defendant will plead guilty because she is in fact guilty of the crime set forth in the superseding indictment. The defendant also agrees that the following are the facts of this case, although she acknowledges that, as to other facts, the parties may disagree:

On or about December 12, 1998, in the County of Tulare, State and Eastern District of California, the defendant did knowingly and intentionally sell approximately 227.8 grams of a mixture containing 11.7 grams of actual methamphetamine to an undercover agent.

Specifically, the defendant negotiated with an undercover agent to sell approximately ½ pound of methamphetamine in exchange for \$2,300. The defendant then arranged for Isidro Torres to pick-

1 up [sic] the drugs and deliver them
2 to where she and the agent were
3 waiting. The defendant knew that
4 she was distributing
methamphetamine, a controlled
substance.

5 Petitioner was sentenced on January 26, 2004 to 60 months
6 incarceration. Petitioner did not file a Notice of Appeal.

7 Petitioner raises several grounds for relief.

8 1. Ground One.

9 As Ground One, petitioner asserts "violation of Fifth and
10 Sixth Amendment".

11 Petitioner, relying on *Apprendi v. New Jersey*, 530 U.S. 466
12 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004), contends
13 that, although she admitted her guilt during the change of plea
14 proceedings, "the district court applied enhancements based on
15 the facts that were never proved to a jury or admitted by the
16 defendant."

17 Petitioner's assertion is false. The Presentence
18 Investigation Report determined petitioner's base offense level
19 to be 28 pursuant to USSG § 2D1.1(c)(6) based on the amount of
20 methamphetamine admitted by petitioner during her change of plea
21 to have been distributed. No other enhancements to the
22 determination of petitioner's base offense level were recommended
23 by the Probation Office. The Presentence Report recommended a 3-
24 level decrease to the base offense level pursuant to USSG §
25 3E1.1(a) and (b) for acceptance of responsibility. Based on the
26 adjusted base offense level of 25 and a criminal history category

1 of I, the Presentence Report determined a guideline range of 60
2 to 71 months and recommended that a 60 month sentence be imposed.
3 Petitioner was sentenced to 60 months.

4 Petitioner asserts that she was prejudiced by defense
5 counsel's failure to file an appeal raising the issue that
6 Petitioner's sentence was unlawful under *Apprendi* and *Blakely*.

7 Petitioner waived her right to appeal in the Plea Agreement.
8 She stated under oath during the change of plea proceedings that
9 she understood the waiver and that she agreed to it. At
10 sentencing, the Court did not advise Petitioner of her right to
11 appeal because of the waiver in the Plea Agreement. Petitioner
12 does not assert in her Section 2255 motion that she requested or
13 instructed defense counsel to file an appeal following imposition
14 of sentence.

15 In cases where the defendant neither instructs counsel to
16 file an appeal nor asks that an appeal not be taken, the Supreme
17 Court in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), holds:

18 [T]he question whether counsel has performed
19 deficiently by not filing a notice of appeal
20 is best answered by first asking a separate,
21 but antecedent, question: whether counsel in
22 fact consulted with the defendant about an
23 appeal. We employ the term 'consult' to
24 convey a specific meaning - advising the
25 defendant about the advantages and
26 disadvantages of taking an appeal, and making
a reasonable effort to discover the
defendant's wishes. If counsel has consulted
with the defendant, the question of deficient
performance is easily answered: Counsel
performs in a professionally unreasonable
manner only by failing to follow the
defendant's express instructions with respect
to an appeal ... If counsel has not consulted

1 with the defendant, the court must in turn
2 ask a second, and subsidiary, question:
3 whether counsel's failure to consult with the
4 defendant itself constitutes deficient
5 performance. That question lies at the heart
6 of this case: Under what circumstances does
7 counsel have an obligation to consult with
8 the defendant about an appeal?

9 ...

10 We ... hold that counsel has a
11 constitutionally-imposed duty to consult with
12 the defendant about an appeal when there is
13 reason to think either (1) that a rational
14 defendant would want to appeal (for example,
15 because there are nonfrivolous grounds for
16 appeal), or (2) that this particular
17 defendant reasonably demonstrated to counsel
18 that he was interested in appealing. In
19 making this determination, courts must take
20 into account all the information counsel knew
21 or should have known ... Although not
22 determinative, a highly relevant factor in
23 this inquiry will be whether the conviction
24 follows a trial or a guilty plea, both
25 because a guilty plea reduces the scope of
26 potentially appealable issues, and because
such a plea may indicate that the defendant
seeks an end to judicial proceedings. Even
in cases where the defendant pleads guilty,
the court must consider such factors as
whether the defendant received the sentence
bargained for as part of the plea and whether
the plea expressly reserved or waived some or
all appeal rights. Only by considering all
relevant factors in a given case can a court
properly determine whether a rational
defendant would have desired an appeal or
that the particular defendant sufficiently
demonstrated to counsel an interest in an
appeal.

1 *Id.* at 478, 480. With respect to the prejudice prong of a claim
2 of ineffective assistance of counsel, the Supreme Court holds
3 that "to show prejudice in these circumstances, a defendant must
4 demonstrate that there is a reasonable probability that, but for

1 counsel's deficient failure to consult with him about an appeal,
2 he would have timely appealed." *Id.* at 484. The Supreme Court
3 concluded:

4 As with all applications of the Strickland
5 test, the question whether a given defendant
6 has made the requisite showing will turn on
7 the facts of a particular case ...
8 Nonetheless, evidence that there were
9 nonfrivolous grounds for appeal or that the
10 defendant in question promptly expressed a
11 desire to appeal will often be highly
12 relevant in making this determination. We
13 recognize that the prejudice inquiry we have
14 described is not wholly dissimilar from the
15 inquiry used to determine whether counsel
16 performed deficiently in the first place;
specifically, both may be satisfied if the
defendant shows nonfrivolous grounds for
appeal ... But, while the performance and
prejudice prongs may overlap, they are not in
all cases co-extensive. To prove deficient
performance, a defendant can rely on evidence
that he sufficiently demonstrated to counsel
his interest in an appeal. But such evidence
alone is insufficient to establish that, had
the defendant received reasonable advice from
counsel about the appeal, he would have
instructed his counsel to file an appeal.

17 By the same token, although showing
18 nonfrivolous grounds for appeal may give
19 weight to the contention that the defendant
20 would have appealed, a defendant's inability
21 to 'specify the points he would have raised
22 were his right to appeal reinstated,' ...
23 will not foreclose the possibility that he
24 can satisfy the prejudice requirement where
25 there are other substantial reasons to
26 believe that he would have appealed ... We
similarly conclude here that it is unfair to
require an indigent, perhaps pro se,
defendant to demonstrate that his
hypothetical appeal might have had merit
before any advocate has even reviewed the
record in his case in search of potentially
meritorious grounds for appeal. Rather, we
require the defendant to demonstrate that,
but for counsel's deficient conduct, he would

1 have appealed.

2 Id. at 485-486.

3 Petitioner has not demonstrated that counsel was ineffective
4 in failing to consult her about filing an appeal or filing an
5 appeal on her behalf. Petitioner expressly waived her right to
6 appeal in the Plea Agreement. Petitioner had obtained the
7 benefit of a favorable plea bargain, which would have been
8 jeopardized if a Notice of Appeal was filed. Petitioner's
9 contentions concerning *Apprendi* and *Blakely* provided no ground
10 for appeal because Petitioner admitted the amount of drugs
11 involved under oath during the change of plea colloquy and no
12 other enhancements were utilized in determining Petitioner's
13 sentence under the Sentencing Guidelines. Because there was no
14 ground for appeal, appeal had been waived, and Petitioner
15 obtained the benefit of a very favorable plea bargain, no
16 rational defendant would want to appeal. Defense counsel's
17 failure to file a Notice of Appeal was not constitutionally
18 deficient performance.

19 2. Ground Two.

20 Petitioner asserts "violation of Rule 11", stating: "Counsel
21 never explain to me the consequences of signing the plea
22 agreement, he never look for mitigating factors to help my case."
23 Petitioner further asserts:

24 Even though movant continued to request
25 counsel to provide her with every document
26 concerning her indictment. She was never
shown one document. Counsel did not explore
every possibility of her plea agreement.

1 Counsel did not pursue favorable negotiations
2 on movant's behalf. Counsel continuously
3 used unprofessional behavior, that was
4 frightening to the magnitude to stop the plea
5 agreement, and movant pled guilty under
6 fearful tactics of counsel. Movant asserted
7 to the court, that she believed that counsel
8 had represented her professionally. However,
9 not having any knowledge of the law. [sic]
10 How does one know if he being professionally
11 [sic] represented? There was a conflict of
12 interest, when counsel knew that he had not
13 provided movant the opportunity to view
14 documents of the charge.

15 Petitioner's claim is without merit. Petitioner stated
16 under oath at the change of plea proceedings that she had
17 discussed with defense counsel the charges against her and how
18 she would defend against them if she proceeded to trial, that the
19 plea agreement had been interpreted for her, that she read, that
20 she was able to ask defense counsel any questions she had about
21 the plea agreement, and that she understood the plea agreement.
22 Petitioner stated under oath that she was satisfied with the
23 legal advice and representation that defense counsel had
24 provided, that no other promises had been made to her other than
25 those set forth in the Plea Agreement, and that no one had
26 threatened or put pressure on her to enter into the Plea
Agreement.

21 3. Ground Three.

22 Petitioner asserts "violation of Rule 32", stating: "He was
23 never present at my interviews he never explain to me the P.S.I.,
24 or did objections to the P. officer." Petitioner contends:

25 Here the Court erred by failing to make
26 specific findings as to the accuracy of

1 information in the presentence report.
2 Movant Felix keep telling Counsel of all the
3 issues that movant were not in agree [sic],
4 and the counsel keep saying that this would
5 not affect her sentence and that she was not
6 going to do jail time that he had control of
7 everything Counsel never sit down with movant
8 to discuss all the descripancies [sic] on the
9 presentence report.

10 ...

11 The Presentence investigation report [sic] on
12 movant Felix contains, [sic] several factual
13 inaccuracies, presumably offered by the
14 government for example quataty [sic] of drugs
15 used for sentencing, criminal history,
16 realation [sic] with the co-defendants and so
17 many issues that movant do not agree and
18 kept [sic] telling the counsel to object to
19 all those issues but nounsel [sic] never
20 argue to all this descripancies [sic].

21 Which are not supported by evidence and
22 indeed are contradicted by facts known to the
23 government. These inaccuracies were belived
24 [sic] and create a very harsher and
25 unjustified sentence.

26
27 Petitioner's claims are without merit. In response to
28 questions before sentence was imposed, Petitioner stated that the
29 Presentence Investigation Report had been interpreted for her,
30 that she had discussed the Presentence Investigation Report with
31 defense counsel, and that she understood the Presentence
32 Investigation Report. The Presentence Investigation Report
33 states in paragraph 13 that Petitioner was interviewed at the
34 Fresno County Jail on December 16, 2003 in the presence of
35 defense counsel. When questioned at sentencing whether she
36 wished to say anything, petitioner only stated that she wished to
37 be allowed to be close to her family. Petitioner did not

1 challenge the accuracy of the Presentence Investigation Report,
2 state that defense counsel had not been present at the interview
3 by the Probation Officer, or state that she did not incur the
4 prior narcotics conviction described in paragraphs 27-30 of the
5 Presentence Investigation Report. The quantity of drugs used to
6 calculate Petitioner's sentence was the amount of drugs
7 Petitioner admitted to under oath at the change of plea
8 proceedings.

9 CONCLUSION

10 For the reasons stated:

11 1. Petitioner Teresa Felix's motion to vacate, set aside or
12 correct sentence pursuant to 28 U.S.C. § 2255 is DENIED;

13 2. The Clerk of the Court is directed to enter Judgment for
14 Respondent.

15 IT IS SO ORDERED.

16 Dated: May 22, 2008

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE